



*Serving the Iowa Legislature*

# IOWA LEGISLATIVE INTERIM CALENDAR AND BRIEFING

November 20, 2013

2013 Interim No. 12

## In This Edition

<b>Calendar .....</b>	<b>1</b>
<b>Agendas .....</b>	<b>2</b>
<b>Briefings .....</b>	<b>3</b>
• Administrative Rules Review Committee (11/8/13)	
<b>Legal Updates .....</b>	<b>4</b>
• Federal Defense of Marriage Act Ruled Unconstitutional in Part	
• Standing Denied Regarding California Proposition on Same-sex Marriage Previously Held Unconstitutional	

## November 2013

Sun	Mon	Tue	Wed	Thu	Fri	Sat
					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30

## December 2013

Sun	Mon	Tue	Wed	Thu	Fri	Sat
1	2	3	4	5	6	7
8	9	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30	31				

Wednesday, December 4, 2013

### **Legislative Tax Expenditure Committee**

10:00 a.m., Room 103, Supreme Court Chamber, Statehouse

Tuesday, December 10, 2013

### **Administrative Rules Review Committee**

9:30 a.m., Room 116, Statehouse

### **Iowa Rivers and Waterways Study Committee**

Time to be announced, Room 103, Supreme Court Chamber, Statehouse

Wednesday, December 11, 2013

### **Public Retirement Systems Committee**

9:30 a.m., Room 103, Supreme Court Chamber, Statehouse

Thursday, December 12, 2013

### **Revenue Estimating Conference**

2:00 p.m., Room 116, Statehouse

Tuesday, December 17, 2013

### **Mental Health and Disability Services Redesign Fiscal Viability Study Committee**

10:00 a.m., Room 103, Supreme Court Chamber, Statehouse

*Iowa Legislative Interim Calendar and Briefing* is published by the Legal Services Division of the Legislative Services Agency (LSA). For additional information, contact: LSA at (515) 281-3566.

# AGENDAS

## INFORMATION REGARDING SCHEDULED MEETINGS

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### **Legislative Tax Expenditure Committee**

Temporary Co-chairperson: Senator Joe Bolkcom

Temporary Co-chairperson: Representative Tom Sands

Location: Room 103, Supreme Court Chamber, Statehouse

Date & Time: Wednesday, December 4, 2013, 10:00 a.m.

Contact Persons: Michael Duster, Legal Services, (515) 281-4800; Mike Mertens, Legal Services, (515) 281-3444; Joe McEniry, Legal Services, (515) 281-3189.

Tentative Agenda: Presentations concerning the tax credits required to be reviewed by the committee under Iowa Code §2.48.

Internet Page: <https://www.legis.iowa.gov/Schedules/committee.aspx?GA=85&CID=511>

### **Administrative Rules Review Committee**

Chairperson: Representative Dawn Pettengill

Vice Chairperson: Senator Wally Horn

Location: Room 116, Statehouse

Date & Time: Tuesday, December 10, 2013, 9:30 a.m.

Contact Persons: Joe Royce, LSA Counsel, (515) 281-3084; Jack Ewing, LSA Counsel, (515) 281-6048.

Agenda: Published in the Iowa Administrative Bulletin:

<https://www.legis.iowa.gov/IowaLaw/AdminCode/bulletinSupplementListing.aspx>

Internet Page: <https://www.legis.iowa.gov/Schedules/committee.aspx?GA=85&CID=53>

### **Iowa Rivers and Waterways Study Committee**

Temporary Co-chairperson: Senator Dick Dearden

Temporary Co-chairperson: Representative Lee Hein

Location: Room 103, Supreme Court Chamber, Statehouse

Date & Time: Tuesday, December 10, 2013, Time to be announced.

Contact Persons: Tim McDermott, Legal Services, (515) 281-8090; Doug Adkisson, Legal Services, (515) 281-3884; Ann Ver Heul, Legal Services, (515) 281-3837.

Tentative Agenda: Presentations regarding river restoration.

Internet Page: <https://www.legis.iowa.gov/Schedules/committee.aspx?GA=85&CID=926>

### **Public Retirement Systems Committee**

Co-chairperson: Senator Thomas Courtney

Co-chairperson: Representative Dawn Pettengill

Location: Room 103, Supreme Court Chamber, Statehouse

Date & Time: Wednesday, December 11, 2013, 9:30 a.m.

Contact Persons: Ed Cook, Legal Services, (515) 281-3994; Andrew Ward, Legal Services, (515) 725-2251; Rick Nelson, Legal Services, (515) 242-5822.

Tentative Agenda: Presentations on the Iowa Public Employees' Retirement System (IPERS), Public Safety Peace Officers' Retirement, Accident, and Disability System (PORS), Judicial Retirement System, and other related issues.

Internet Page: <https://www.legis.iowa.gov/Schedules/committee.aspx?GA=85&CID=57>

### **Mental Health and Disability Services Redesign Fiscal Viability Study Committee**

Co-chairperson: Senator Joe Bolkcom

Co-chairperson: Representative David Heaton

Location: Room 103, Supreme Court Chamber, Statehouse

Date & Time: Tuesday, December 17, 2013, 10:00 a.m.

Contact Persons: John Pollak, Legal Services, (515) 281-3818; Patty Funaro, Legal Services, (515) 281-3040; Amber DeSmet, Legal Services, (515) 281-3745.

Agenda: To be announced.

Internet Page: <https://www.legis.iowa.gov/Schedules/committee.aspx?GA=85&CID=849>

### ADMINISTRATIVE RULES REVIEW COMMITTEE

November 8, 2013

**Chairperson:** Representative Dawn Pettengill

**Vice Chairperson:** Senator Wally Horn

**EMERGENCY RULEMAKING REQUEST,** 2013 Iowa Acts, HF 586, provides that an agency can adopt a rule without notice only with specific statutory authority or with prior approval by the Administrative Rules Review Committee (ARRC). Under this new procedure, the committee reviews requests by agencies to adopt rules without notice at its monthly meeting or at special meetings if necessary. The Administrative Rules Review Committee gave pre-approval for two emergency filings for the Department of Human Services: Iowa Health And Wellness Plan, Ch. 74, and Conditions of Eligibility, Ch. 75.

#### **ENVIRONMENTAL PROTECTION COMMISSION, *Unstaffed Underground Storage Tanks (USTs)*, ARC 1100C, 10/16/13 IAB, ADOPTED.**

**Background.** These provisions were initially reviewed by the committee in August 2013. Under the rules, leak detection methods in USTs must provide either a leak detector capable of shutting off the submersible pump or a device that immediately alerts the operator when a leak is detected.

**Commentary.** This proposal allows existing in-line leak detection methods to be used when the UST facility is unattended, with additional requirements to ensure that detected releases are addressed. The proposal allows for immediate shutdown of the submersible pump when a release is detected. It also allows for flow restriction or the triggering of an audible or visual alarm when a leak is detected and either notification to or a daily visit by the facility's operator. Notification can occur either by immediate electronic communication of a release from the leak detection monitor or by signage at the site with a telephone number directing the customer to call the operator or designee when a potential release is indicated.

**Action.** The committee took no action.

#### **EDUCATION DEPARTMENT, *Supplementary Weighting Plan for Operational Services*, ARC 1119C, 10/16/13 IAB, ADOPTED.**

**Background.** This rulemaking is intended to comply with recent legislative changes that reauthorized and modified the current statute providing for supplementary weighting used for school district funding. Additional classifications of employees were allowed to be shared between districts. In addition, districts no longer need to be adjoining to participate in this program.

At the committee's September 2013 meeting, significant public comment was heard relating to a dispute over whether the underlying legislation, 2013 Iowa Acts, HF 472, allows school districts to add new staff for these shared positions. The department contends that it does not and that a contrary interpretation would significantly increase the cost of the legislation beyond what was projected during the 2013 Legislative Session. Public commenters, including several school superintendents, contended the framework proposed by the department is unworkable for school districts, as it requires them to make staffing decisions presently in order to possibly receive the additional funding for the following school year, for which they will not be eligible if they hire additional staff.

**Commentary.** A department representative reviewed the dispute over its interpretation of the intent of the underlying legislation. The department has had discussions with stakeholders and has not been able to resolve the matter. The department remains concerned about significant cost increases that would result if school districts are allowed to add new staff for these shared positions. The department is uncertain regarding legislative intent on this point. The department suggested that the committee impose a session delay on this rulemaking in order to allow the General Assembly to resolve the matter in its upcoming session. Public comment was heard from a stakeholder who supported imposing such a delay. The committee voted to impose a session delay.

**Action.** The committee imposed a session delay.

#### **PUBLIC HEALTH DEPARTMENT, *Vital Records—Time-limited Fee Increases*, ARC 1074C, 10/02/13 IAB, HELD OVER FROM OCTOBER.**

**Background.** The department implements a time-limited fee increase for specific vital records. This increase will finance the development and implementation of the Iowa vital events system, including the electronic registration and issuance of vital records and new events and the conversion of historical records. The fee increase is estimated to generate \$6.35 million through July 1, 2019, to be used for the software for the system and for the incorporation of the historical records into a single system.

At the committee's October 2013 meeting, members expressed concern over the refund policy set out in the fee structure. The policy provides that any overpayment of less than \$20 received for the copying of or search for vital records, or for the preparation or amending of a certificate, will not be refunded. Several committee members stated they felt this policy is excessive and unfair. Department representatives stated that the limitation has been in the rules since 1991, and noted the expense of ordering and issuing a refund check. Members felt the limitation should be reduced to a few dollars. The com-

# BRIEFINGS

## INFORMATION REGARDING RECENT ACTIVITIES

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*(Administrative Rules Review Committee continued from Page 3)*

mittee imposed a 70-day delay on the provision relating to refunds.

**Commentary.** The director of the department explained that the overpayment language at issue has been in place for a long time and that the cost to the department to process a refund is about \$40. She provided a detailed breakdown of how the department determined that figure. She stated the department has received 88 overpayments this year so far, in an average amount of less than \$5. If the overpayment amount would cover the cost of an additional certificate, the department will assume the customer intended to purchase multiple certificates. The director also stated that the Board of Public Health will rescind the delayed provision at its next meeting, and sought input from the committee on how the current overpayment language could be changed to resolve this issue.

Committee members were skeptical of the \$40 figure and suggested the department look at how other state agencies provide refunds to see if the process could be made more efficient. A committee member asked how the department resolves an underpayment, and the director stated the department returns the submission to the payer and requests payment in the correct amount. Committee members then urged the department to follow the same approach for overpayments. The issue was raised that sometimes a person's need for a certificate may be time sensitive. Committee members urged the department, when it provides notice of an overpayment, to include information on how a certificate can be obtained quickly.

**Action.** The committee took no action; additional review in December.

### **VETERANS AFFAIRS DEPARTMENT, Iowa Veterans Home, ARC 1157C, 10/30/13 IAB, ADOPTED.**

**Background.** These amendments reflect changes to comply with the enactment of 2013 Iowa Acts, HF 544, which made various changes relating to the Iowa Veterans Home, and to reflect the operational changes the Iowa Veterans Home has undertaken since the last revision of these rules.

**Commentary.** The review of this rulemaking has been moved to the committee's December meeting. The committee voted to impose a 70-day delay on the rulemaking in order to maintain its full review powers until that meeting.

**Action.** The committee imposed a 70-day delay.

**Next Meeting.** The next regular committee meeting will be held in Committee Room 116, on Tuesday, December 10, 2013, beginning at 9:30 a.m.

**Secretary ex officio:** Stephanie Hoff, Administrative Code Editor, (515) 281-3355.

**LSA Staff:** Joe Royce, LSA Counsel, (515) 281-3084; Jack Ewing, LSA Counsel, (515) 281-6048.

**Internet Page:** <https://www.legis.iowa.gov/Schedules/committee.aspx?GA=85&CID=53>

## LEGAL UPDATES

**Purpose.** A legal update briefing is intended to inform legislators, legislative staff, and other persons interested in legislative affairs of recent court decisions, Attorney General opinions, regulatory actions, and other occurrences of a legal nature that may be pertinent to the General Assembly's consideration of a topic. As with other written work of the nonpartisan Legislative Services Agency, although this briefing may identify issues for consideration by the General Assembly, nothing contained in it should be interpreted as advocating a particular course of action.

### **LEGAL UPDATE—FEDERAL DEFENSE OF MARRIAGE ACT RULED UNCONSTITUTIONAL IN PART**

Filed by the United States Supreme Court

June 26, 2013

#### **United States v. Windsor**

No. 12-307

[http://www.supremecourt.gov/opinions/12pdf/12-307\\_6j37.pdf](http://www.supremecourt.gov/opinions/12pdf/12-307_6j37.pdf)

**Background.** Two women, Edith Windsor and Thea Spyer, met in 1963 in New York City and began a long-term relationship. They registered as domestic partners in 1993 when this status became available in New York. When Spyer's health deteriorated due to multiple sclerosis and a heart condition, the couple traveled to Canada in 2007, where same-sex marriage was legal, married, and thereafter resided in New York City. Their marriage was deemed valid in New York. Spyer died in February 2009, leaving her entire estate to Windsor. Windsor did not qualify for the marital exemption from the federal estate tax because under section 3 of the federal Defense of Marriage Act (DOMA), Windsor, as a same-sex spouse, was not defined as a "surviving spouse." Windsor paid \$363,053 in estate taxes, requested a refund, and the Internal Revenue Service denied the refund citing DOMA. Windsor then filed suit for a refund in the United States District Court for the Southern District of New York, contending that DOMA violates equal protection as applied to the federal government through the

# BRIEFINGS

## INFORMATION REGARDING RECENT ACTIVITIES

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*(Legal Update—Federal Defense of Marriage Act Ruled Unconstitutional in Part continued from Page 4)*

Fifth Amendment to the Constitution of the United States. While the suit was pending, the Attorney General of the United States informed the U.S. Speaker of the House of Representatives in a letter that the Department of Justice (DOJ) would no longer defend the constitutionality of section 3 of DOMA. In the letter, the Attorney General informed Congress that the President had determined that based on various factors, classifications based on sexual orientation should be subject to a heightened standard of scrutiny. However, the President also instructed the DOJ that section 3 of DOMA would continue to be enforced by the executive branch to recognize the judiciary as the final arbiter of the constitutional claims. Generally, 28 U.S.C. §530D letters are preceded by an adverse judgment, but this letter reflected the President's own determination, prior to resolution by the courts, that heightened equal protection scrutiny should apply to laws that classify based on sexual orientation. Following submission of the letter, the Bipartisan Legal Advisory Group (BLAG) of the United States House of Representatives voted to intervene to defend the constitutionality of section 3 of DOMA. The District Court denied intervention as of right, but did grant intervention as an interested party.

The District Court ruled against the United States on the merits, holding that section 3 of DOMA is unconstitutional and ordered payment of the refund with tax and interest. Both the DOJ and BLAG filed notice of appeal and the Solicitor General filed a petition for certiorari. Before the petition was heard, the Court of Appeals for the Second Circuit affirmed the judgment of the District Court applying heightened scrutiny. The United States did not comply with the judgment, no refund was issued, and the executive branch continued to enforce section 3 of DOMA.

The United States Supreme Court (Court) granted certiorari on the constitutionality of section 3 of DOMA. The Court also requested briefing and argument on the questions of whether the United States' agreement with Windsor's legal position precludes further review and whether BLAG has standing to appeal the case. Justice Kennedy delivered the opinion of the Court in which Justices Ginsburg, Breyer, Sotomayor, and Kagan joined.

**Issue—Jurisdiction.** Whether the government, by agreeing that the law is unconstitutional, precludes further review and whether BLAG has standing to appeal to the Court of Appeals and to seek certiorari.

### **Analysis.**

**District Court—Justiciable Controversy.** When the case was in the District Court there was a concrete disagreement between the parties, and the taxpayer had standing to challenge the collection of a specific tax as unconstitutional and suffered a redressable injury that was concrete, persistent, and unredressed. Even though the government agreed with Windsor's position, the Court determined that in the District Court, there was still a justiciable controversy.

**Appeal and Petition for Certiorari—Jurisdictional Requirements and Prudential Limitations.** Once the District Court issued its judgment ordering the refund, the parties were no longer adverse. The amicus position was that because the parties were no longer adverse and the government did not seek redress from the judgment, the appeal and the petition for certiorari should be dismissed.

The Court, however, distinguished between two principles relating to a determination of standing under Article III: the jurisdictional requirements (the Article III standing which enforces the constitutionally based case or controversy requirement) and the prudential limits on its exercise (the judicially imposed limits on exercise of federal jurisdiction). Article III standing requires that the plaintiff has suffered an injury in fact that is concrete and particularized as well as actual or imminent; that there is a causal connection between the injury in fact and the challenged conduct; and that the injury is likely to be redressed by a favorable decision. The Court asserted that the rules of prudential standing are more flexible rules of appellate practice to protect the Court from deciding abstract questions of wide public significance when there are other options to address the questions.

**Jurisdictional Requirements.** The Court determined that the United States retained a significant stake sufficient to support Article III standing on appeal and on certiorari. Even though the executive branch disagreed with section 3 of DOMA, Windsor's judgment for a refund, the government's refusal to pay, and Windsor's ongoing claim for payment establishes a controversy sufficient for Article III jurisdiction. Additionally, the payment of the refund by the government would be a real economic injury to the government sufficient to constitute standing in the case. In *INS v. Chadha*, 462 U.S. 919 (1983), the executive branch determined that the statute allowing one house of Congress to deport an individual was unconstitutional, but the Immigration and Naturalization Service (INS) continued to abide by the statute. The Court found that the INS was sufficiently aggrieved by the Court of Appeal's decision, prohibiting it from taking action it would have taken but for the decision, to constitute a justiciable dispute required by Article III. Even when the government agrees with the opposing party on the merits, sufficient adverseness and an adequate basis for jurisdiction remains if the government intends to enforce the challenged law against the party. Additionally, even though a party that receives all the relief sought generally cannot appeal, the party may still appeal if the party retains a stake in the appeal satisfying the requirements of Article III.

**Prudential Limitations.** While the Court found that a justiciable controversy remained, it also determined that the prudential problems stemming from the executive branch's unusual position in agreeing with Windsor's legal argument required further discussion. There are reasons to hear a case and issue a ruling even when one party is reluctant to prevail.



# BRIEFINGS

## INFORMATION REGARDING RECENT ACTIVITIES

*(Legal Update—Federal Defense of Marriage Act Ruled Unconstitutional in Part continued from Page 5)*

Prudential considerations that counsel against hearing a case may be outweighed by countervailing considerations. One such consideration is the extent to which adversarial presentation of the issues is assured by the participation of amici curiae prepared to defend with vigor the constitutionality of the legislative act. In this case, BLAG presented a substantial argument for the constitutionality of section 3 of DOMA, thereby satisfying the prudential concerns against hearing an appeal when the principal parties agree. If the Court dismissed the case, extensive litigation would ensue because the district courts would have no precedential guidance in cases involving not only tax refunds, but also cases involving the over 1,000 federal statutes and federal regulations that are based on the definition of spouse in section 3 of DOMA. While the extent of DOMA's mandate would make it more likely that another case without the prudential concerns raised in this case would arise in the future, the cost in judicial resources and expense of litigation for those adversely affected prior to the resolution of the issue would be immense.

**Separation of Powers Concerns—Not a Common Practice.** While the Court determined that the petition may be heard on the merits, it did caution that if this were a common practice, difficulties would ensue. Because the executive branch failed to defend the constitutionality of section 3 of DOMA, based on a constitutional theory not yet established in a judicial decision, a procedural dilemma is created. On one hand, the government's agreement with Windsor raises questions about the propriety of entertaining a suit in which the government seeks affirmance of an order invalidating a federal law and ordering the United States to pay money. On the other hand, if the executive branch's agreement with the plaintiff that the law is unconstitutional is enough to preclude judicial review, the Court's primary role in determining the constitutionality of a law that inflicts real injury on a plaintiff who brought a justiciable claim would become secondary to the President's, and undermine the clear distinction of the principle of separation of powers with respect to judicial branch powers. Additionally, with respect to legislative branch powers, when Congress passes a statute and the President signs it, if the executive branch later nullifies the legislative enactment on its own initiative and without a determination of the Court, this also poses a threat to the principle of separation of powers. When the executive branch makes a decision that a law is unconstitutional, it faces a difficult choice. It is appropriate for the executive branch to make the case to Congress to amend or repeal a law, otherwise the integrity of the political process would be at risk if difficult constitutional issues were referred to the Court routinely. However, the case in point is not routine: it is of immediate importance to the federal government and to hundreds of thousands of people, thereby supporting the Court's decision to proceed on the merits.

**Holding.** The Court has jurisdiction to consider the merits of the case. Because of the unusual and urgent circumstances of the case, it is the Court's proper responsibility to take jurisdiction. The prudential and Article III requirements are met in this case and the Court did not need to determine if BLAG would have standing to challenge the previous rulings on BLAG's own authority.

**Issue—Constitutionality of DOMA.** Whether section 3 of DOMA violates the Fifth Amendment of the United States Constitution guaranteeing equal protection of the laws as applied to persons of the same sex who are legally married under the laws of their state.

**Analysis.** Marriage laws have changed over time in those states where the citizens have determined that limiting lawful marriage to heterosexual couples is an unjust exclusion. In New York, initially, the state only recognized same-sex marriages performed elsewhere. Later New York amended its own marriage laws to permit same-sex marriage in the state.

Historically and traditionally, the definition and regulation of marriage has been within the purview and authority, and virtually the exclusive province, of the individual states. State laws defining and regulating marriage must do so in a manner that respects the constitutional rights of persons. The definition of marriage in a state is central to the state's domestic relations law applicable to those domiciled within its borders, and throughout history the federal government has deferred to state law policy decisions with respect to domestic relations. When the Federal Constitution was adopted, it was common understanding that domestic relations were the purview of the states. Congress has, however, enacted statutes and made determinations that bear on marital rights and privileges. Some such actions include those relating to the right of a spouse to life insurance proceeds, marriages entered into relative to immigration status, and the income-based criteria for Social Security benefits. DOMA has a far greater reach in affecting marriage rights and privileges by enacting a directive applicable to over 1,000 federal statutes and numerous federal regulations.

In those states where lawful marriage is defined to include same-sex couples, the states decided to utilize their historic and essential authority to give a class of persons the right to marry, conferring upon them a dignity and status of import. The extent and reach of DOMA departs from this traditionally state-based province and instead uses this state-defined class to impose restrictions and disabilities. The Court must determine if the resulting injury and indignity is a deprivation of an essential part of the liberty protected by the Fifth Amendment. What the state of New York treats as alike, DOMA treats as unlike and injures the same class the state seeks to protect. Through New York's initial recognition of the validity of same-sex marriages performed in other jurisdictions and subsequent enactment of authorization of same-sex marriages in the state, the state acted to give protection and dignity to that bond. DOMA seeks to injure the class of persons that New York seeks to protect. DOMA's deviation from the usual tradition of recognizing and accepting state definitions of marriage operates to

# BRIEFINGS

## INFORMATION REGARDING RECENT ACTIVITIES

*(Legal Update—Federal Defense of Marriage Act Ruled Unconstitutional in Part continued from Page 6)*

deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages. The purposes and practical effect of the law is to impose a disadvantage, a separate status, and a stigma on individuals who enter same-sex marriages that are lawful under the purview of the state. The legislative history of DOMA, which was titled “The Defense of Marriage Act,” evidences that the purpose was to defend the institution of traditional heterosexual marriage and to express both moral disapproval of homosexuality and a moral conviction that heterosexuality better comports with traditional morality. The Act’s demonstrated purpose was to ensure that if any state decides to recognize same-sex marriages, those unions will be treated as second-class marriages for the purpose of federal law. This raises serious Fifth Amendment concerns. When New York enacted its law permitting same-sex marriage, it sought to eliminate inequality. DOMA writes inequality into the entire United States Code. DOMA applies to not only the estate tax affected in this case, but to over 1,000 statutes and numerous federal regulations including those pertaining to Social Security, housing, taxes, criminal sanctions, copyright, and veterans’ benefits. DOMA’s principal effect is to identify a subset of state-sanctioned marriages and make them unequal. DOMA forces same-sex couples to live as married for the purposes of state law, but unmarried for the purposes of federal law, undermining the public and private significance of state-sanctioned same-sex marriages, classifying otherwise valid marriages as unworthy of federal recognition and as second-tier marriages. The differentiation demeans the couple whose moral and sexual choices the Constitution protects, and whose relationship the state dignifies. Additionally, it makes it even more difficult for the children being raised by same-sex couples to understand their own family and its place among the other families in the community. DOMA touches varied aspects of married and family life through limitations on public benefits and protections for the couple and brings financial harm to the children of same-sex couples.

Congress has great power to design laws, but it cannot deny the liberty protected by the Due Process Clause of the Fifth Amendment. DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution, which contains a prohibition against denying any person the equal protection of the laws. The Fifth Amendment withdraws from government the power to degrade or demean in the way DOMA does, and the equal protection guarantee of the 14th Amendment makes the Fifth Amendment right all the more specific and all the better understood and preserved.

DOMA directs its restrictions and restraints on those persons who are joined in same-sex marriages made lawful by the states. DOMA singles out this class of persons, and imposes a disability on the class by refusing to acknowledge a status the state recognizes as dignified and proper. DOMA instructs everyone, including the children of the couple, that their marriage is less worthy than the marriages of others. DOMA is invalid because no legitimate purpose overcomes the effect of disparaging and injuring those whom the state, through its marriage laws, sought to protect. DOMA is in violation of the Fifth Amendment because it displaces the state-sanctioned protection of persons in same-sex marriages and treats those persons living in these marriages with less respect than others. The opinion and its holding are limited to those lawful marriages.

**Holding.** Section 3 of the Defense of Marriage Act is unconstitutional as a deprivation of the equal liberty of persons that is protected by the Fifth Amendment.

### **Dissenting Opinions.**

**Chief Justice Roberts.** Chief Justice Roberts filed a dissenting opinion. Justice Roberts concluded the Court lacked jurisdiction to review the decisions of the courts below. On the merits of the constitutionality of the law, Justice Roberts concluded that Congress acted constitutionally in the interests of uniformity and stability in passing DOMA. Justice Roberts disagreed with the majority analysis and felt it important to point out that the majority analysis leads no further, i.e., that the Court did not have before it, and did not decide, the distinct question whether the states may continue to utilize the traditional definition of marriage. While the Court may have to resolve challenges to state marriage definitions affecting same-sex couples, that issue was not before the Court in this case and the Court lacked jurisdiction to consider it in the context of the case before the Court.

**Justice Scalia.** Justice Scalia filed a dissenting opinion in which Justice Thomas joined and in which Chief Justice Roberts joined as to Part I. Justice Scalia concluded that the Court had neither the jurisdiction to review the case nor the power to invalidate democratically enacted legislation. The majority incorrectly asserted the supremacy of the Court as the final arbiter and primary power within government. The Court can say what the law is when the law is alleged to conflict with the Constitution only when the allegation will determine the outcome of a lawsuit and is contradicted by the other party. Windsor’s injury was cured by the judgment in her favor. In the Court of Appeals and the Supreme Court, neither party sought to undo the judgment for Windsor, and so both courts should have dismissed the appeal for lack of jurisdiction. The Court has never before agreed to say what the law is when there was no controversy before the Court. Justice Scalia did not agree with the majority’s discussion of the requirements of Article III standing as being either jurisdictional or prudential. He did not consider adverseness to be merely a prudential limitation in meeting Article III requirements. The question is whether there is a controversy, which requires contradiction between the United States and Ms. Windsor, and there is not. The authorities the majority cites stand for the proposition that prudential discretion may be utilized to deny an appeal even when a live controversy exists, not the discretion to grant one when it does not. The existence of a controversy is an essential element of Article III, not a prudential requirement.

# BRIEFINGS

## INFORMATION REGARDING RECENT ACTIVITIES

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*(Legal Update—Federal Defense of Marriage Act Ruled Unconstitutional in Part continued from Page 7)*

Some may argue that if the Court did not assert jurisdiction when the President determines a statute is unconstitutional, it will not be subject to judicial review. When both the President and the plaintiff agree, this is as it should be. When the executive branch enforces an unconstitutional law, suit will lie. This suit arose only because the executive branch enforced the Act even though it believed it to be unconstitutional. The President could instead have chosen neither to defend nor enforce the statute, in which case Windsor would not have been injured and the matter would have been left to the President and Congress. The President could also have declined to appeal the lower courts' decisions with which he agreed.

On the merits, Justice Scalia concluded that the majority's justifications were rootless and shifting between federalism, equal protection, and substantive due process. If the case is based upon an equal-protection argument, the majority did not determine whether the Equal Protection Clause required laws restricting the definition of marriage to be reviewed under a rational basis or strict scrutiny standard.

To date, it has been a familiar principle of constitutional law to not strike down an otherwise constitutional law on the basis of alleged illicit legislative motive. Proponents for the passage of DOMA argued that it avoids difficult choice-of-law issues, and that it preserves the intended effects of prior legislation against unforeseen changes in circumstances. The majority concluded, however, that the only motive for the Act was the desire to harm a politically unpopular group. The Court should not rule based upon a presumed insidious intent on the part of Congress.

Justice Scalia concluded that even though the majority limited the holding and the opinion to lawful same-sex marriages by declaring anyone opposed to same-sex marriage an enemy of human decency, the majority armed every potential challenger to a state law restricting marriage to the traditional definition with a basis for challenging the statute.

**Justice Alito.** Justice Alito filed a dissenting opinion in which Justice Thomas joined as to parts II and III. Justice Alito concluded that the United States government did not have standing in the case because the executive branch declined to defend the statute. If the Court reviewed a decision at the behest of such a party, it would be tantamount to rendering an advisory opinion. BLAG did have standing because it represents the interests of the House of Representatives which suffered an injury in fact, and the suit was otherwise undefended. The Court has long held that Congress is the proper party to defend the validity of a statute when an agency of government charged with enforcing the statute agrees with the plaintiffs and refuses to defend the statute on constitutional grounds.

While same-sex marriage presents a highly emotional and important question of public policy, it is not a difficult question of constitutional law. The Court has sometimes found the Due Process Clause to have a substantive component guaranteeing liberties beyond physical restraint and the Court's holding that DOMA is unconstitutional as a deprivation of the liberty of the person protected under the Fifth Amendment of the Constitution suggests that substantive due process may underlie this holding. But, substantive due process only protects those fundamental rights and liberties that are deeply rooted in the nation's history and tradition. The Constitution does not guarantee the right to enter into a same-sex marriage because that right is not deeply rooted in this nation's history and tradition. The definition of marriage should be left to the people to determine through their elected officials.

Windsor and the United States argue that section 3 of DOMA discriminates on the basis of sexual orientation and should trigger a review based on heightened scrutiny. By asking the Court to strike down DOMA as not satisfying heightened scrutiny is tantamount to asking the Court to resolve a debate between the traditional view of marriage as an intrinsically opposite-sex institution, and the new view of marriage as a solemnization of mutual commitment between two persons. The United States Constitution does not codify either view of marriage and the silence of the Constitution on this question should end the matter as to the role of the judiciary. Both state legislatures and Congress may enact laws recognizing either of the two views of marriage, provided the vision they adopt is not countermanded by the Constitution. The Court strikes down section 3 of DOMA as an encroachment on the states' sovereign prerogative to define marriage. The Court's ultimate conclusion is that DOMA runs afoul of the Fifth Amendment because it singles out a class of persons protected and recognized under state law and refuses to recognize a status the state finds dignified and proper. Justice Alito stated his disagreement and did not find DOMA to encroach on the prerogative of the states. Section 3 of DOMA does not prevent any state from recognizing same-sex marriage or from extending any rights, privileges, or benefits to them. Section 3 of DOMA defines a class of persons to whom federal law extends certain special benefits and imposes certain burdens. Section 3 of DOMA does not violate the Fifth Amendment.

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### LEGAL UPDATE—STANDING DENIED REGARDING CALIFORNIA PROPOSITION ON SAME-SEX MARRIAGE PREVIOUSLY HELD UNCONSTITUTIONAL

Filed by the United States Supreme Court

June 26, 2013

#### **Hollingsworth v. Perry**

No. 12-144

[http://www.supremecourt.gov/opinions/12pdf/12-144\\_8ok0.pdf](http://www.supremecourt.gov/opinions/12pdf/12-144_8ok0.pdf)

**Background.** In May 2008, in *In re Marriage Cases*, 43 Cal. 4th 757, 183 P.3d 384, the California Supreme Court held that limiting marriage under two California statutes to only opposite-sex couples violated the Equal Protection Clause of the California Constitution, and thereafter same-sex couples were allowed to marry in the State of California (State). Following the decision, in November 2008, Proposition 8, a ballot initiative, was passed amending the California Constitution to provide that only marriage between a man and a woman is valid or recognized in California. The measure was challenged in the California Supreme Court, which held in *Strauss v. Horton*, 207 P. 3d 48 (May 26, 2009), that Proposition 8 was properly enacted, but that marriages performed before it went into effect would remain valid. The California Supreme Court reasoned that because California law recognized domestic partnerships, Proposition 8 created only a narrow and limited exception to the constitutional rights guaranteed same-sex couples: that of the official designation of the term “marriage.”

Two same-sex couples who wished to marry filed an appeal in federal district court challenging Proposition 8 under the Due Process and Equal Protection Clauses of the 14th Amendment to the United States Constitution. The named defendants included the governor, attorney general, and other state and local officials responsible for enforcing the State’s marriage laws. However, the named officials refused to defend the law even while continuing to enforce it. The federal district court allowed petitioners, the official proponents of the Proposition 8 initiative, to intervene to defend the initiative. The federal district court held Proposition 8 to be unconstitutional and permanently enjoined the California officials named as defendants from enforcing the law. The California officials chose not to appeal, but the petitioners appealed to the Ninth Circuit Court of Appeals. After briefing and argument, the Ninth Circuit certified a question to the California Supreme Court inquiring whether the official proponents of an initiative measure possess a particularized interest in the initiative’s validity or the authority to assert the State’s interest in the initiative’s validity when the public officials charged with the duty of defending the constitutionality of the initiative refuse to do so. The California Supreme Court responded in the affirmative that the official proponents of the initiative are authorized under California law to appear and assert the State’s interest in the initiative’s validity and to appeal a judgment invalidating the measure when the public officials charged with this duty decline to do so.

Based on this response, the Ninth Circuit determined that the petitioners had standing under federal law to defend the constitutionality of Proposition 8, since the State, as an independent sovereign, could decide who may assert its interest. The Ninth Circuit affirmed the federal district court decision that Proposition 8 violated the Equal Protection Clause, that taking away the official designation of marriage while affording all of the rights and obligations to same-sex couples did not further any legitimate state interest of the State, and that Proposition 8 only served to impose a majority’s private disapproval through public law on gays and lesbians.

The United States Supreme Court (Court) granted certiorari to review the determination and directed the parties to brief and argue whether the petitioners had standing under Article III of the United States Constitution. Chief Justice Roberts delivered the opinion of the Court in which Justices Scalia, Ginsburg, Breyer, and Kagan joined.

**Issue—Article III Standing.** The judicial power of the federal courts is limited to deciding actual cases or controversies. Standing is one aspect of this requirement. To demonstrate standing, a litigant must prove that the person has suffered a concrete and particularized injury, fairly traceable to the challenged conduct, that is likely to be redressed by a favorable judicial decision. That is, a party must seek a remedy for a personal and tangible harm. Article III also requires that the actual controversy persist throughout all stages of litigation.

**Particularized Interest.** The parties did not contest that the respondents, the couples wishing to marry, had Article III standing to challenge enforcement of Proposition 8. However, once the federal district court held Proposition 8 to be unconstitutional and enjoined state officials from enforcing the law, the respondents did not have an injury to redress and the state officials did not appeal. The only parties that remained interested in appealing the decision were the petitioners, the interveners in the case.

The petitioners argued that the California Constitution and election laws give them a special role in the initiative process. Once they submit the proposed initiative to the attorney general, they become the official proponents. The Court, however, noted that while the petitioners have a special role during the process of enacting the law, once Proposition 8 was approved, the petitioners no longer had a special role in enforcing the law, nor a personal stake distinguishable from the general public in its enforcement. The petitioners’ interest is not the particularized interest required by Article III to create a case or controversy.

**Representing the Interest of the State.** The petitioners next argued that while they might not have a particularized interest

*(Legal Update—Standing Denied Regarding California Proposition on Same-sex Marriage Previously Held Unconstitutional continued from Page 9)*

of their own, they were representing the interest of the State of California. The Court responded that a litigant must assert the litigant's own legal rights and interests, the litigant's own injury in fact, and not that of a third party.

The petitioners contended that the case before the Court was different as to their assertion of the State's interest because the California Supreme Court had previously determined that they were authorized to appear and assert the State's interest regarding Proposition 8. The district court had then agreed that all the federal court needed to determine was that the State had suffered a harm sufficient to confer standing, and that the party seeking to invoke the jurisdiction of the court was authorized by the State to represent the State. The petitioners asserted that they need not show a personal injury separate from the State's interest in the validity of the law, as with the attorney general or legislative leaders held to have standing in *Karcher v. May*, 484 U.S. 72 (1987).

The Court responded that in *Karcher*, the two New Jersey state legislators, the presiding officers of the Senate and the House of Representatives, were determined to have standing in their official positions to intervene to defend the constitutionality of a law when the attorney general declined to do so because state law designated them as agents of the state to do so in federal court. However, when the two legislators subsequently lost their elections and their official positions as legislators during the pendency of the litigation, they also lost standing. The Court also distinguished the present case from others highlighted by the petitioners, including a case regarding the constitutionality of English as the official language of Arizona, *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1996). In that case, the principal sponsor of the ballot initiative, the Official English Committee, sought to appeal after the district court declared the initiative unconstitutional and the governor announced that she would not pursue an appeal. The Ninth Circuit analogized the Committee to the Arizona Legislature and determined it was qualified to defend the initiative on appeal. Before the case was mooted by other events, the Court expressed grave doubts as to this analysis, noting that while legislators may have standing, the Official English Committee was not comprised of elected officials and there was no Arizona law appointing the Committee as agents of the people of Arizona to defend the initiative in lieu of public officials.

Petitioners responded that by virtue of the California Supreme Court's decision, they are authorized to act as the agents of the people of California. The Court reasoned instead that all the California Supreme Court decision stands for is that the petitioners may argue in defense of Proposition 8, a generalized interest. Petitioners are not agents of the State; the basic features of an agency relationship including the principal's ability to control the agent, the fiduciary duty of the agent to the principal, and the principal's duty to indemnify the agent against expenses incurred in an action, are missing. Neither the Ninth Circuit nor the California Supreme Court ever described the petitioners as agents of the State, and they are not qualified to be agents.

Finally, the Court noted that while the Court did not question California's sovereign right to maintain an initiative process, nor disparage the reasoning of the California Supreme Court in deciding that State law authorized petitioners to defend Proposition 8, standing in federal court is a matter of federal law, not state law. The Article III requirement that a party seek relief for a personal, particularized injury ensures that the limited role of the federal judiciary is maintained. The Court had never upheld standing of a private party to defend the constitutionality of a state statute when state officials chose not to, and declined to do so in this case. The Court concluded that the Ninth Circuit was without jurisdiction to consider the appeal, vacated the judgment of the Ninth Circuit, and remanded the case with instructions to dismiss the appeal for lack of jurisdiction.

**Holding.** The official proponents of Proposition 8, a ballot initiative amending the California Constitution to provide that only marriage between a man and a woman is valid or recognized in California, did not have Article III standing to appeal an adverse decision when public officials refused to do so.

**Dissent.** Justice Kennedy filed a dissenting opinion in which Justices Thomas, Alito, and Sotomayor joined. The dissenting opinion agreed that a proponent's standing to defend an initiative in federal court is a question of federal law. However, there is a threshold question of how California law defines and elaborates the status and authority of an initiative's proponents who seek to intervene in court after the initiative's adoption by the electorate. Under California law, a proponent is authorized to appear in court and assert the State's interest in defending an enacted initiative when the public officials charged with that duty decline to do so. The majority concluded that the State-conferred authority falls short of meeting federal requirements because the proponents did not receive a formal delegation of authority that meets the requirements of the Restatement of Agency. Article III does not require California to comply with the Restatement of Agency or the Court's view on how the State should make its laws or structure its government. The initiative system in California is based on fundamental principles and dynamics that use the initiative mechanism to bypass and control public officials. This decision will affect other states with initiative processes.

The State of California received a concrete injury when the federal district court nullified Proposition 8. The California Elections Code does not expressly prescribe the terms and duties or rights of proponents once an initiative becomes law. However, it is up to a state to determine the substance of state law, and the California Supreme Court determined that the proponents do have authority under California law to appear and assert the State's interest in the initiative's validity and appeal a

# BRIEFINGS

## INFORMATION REGARDING RECENT ACTIVITIES

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*(Legal Update—Standing Denied Regarding California Proposition on Same-sex Marriage Previously Held Unconstitutional continued from Page 10)*

judgment invalidating the measure when public officials decline to do so. Official proponents are a small, identifiable group. They know and understand the proposed law, their commitment is substantial, and they have a stake in the outcome. The proponents play a unique role in the initiative process, as specified in the California Constitution and the Elections Code. The very object of the initiative process is to establish a law-making process that does not depend on state officials. Additionally, the conventional agency relationship is inconsistent with the history, design, and purpose of the initiative process. The Court's precedents do not indicate that a formal agency relationship is necessary. Both the California Supreme Court and the Court of Appeals of California determined that the proponents satisfied the requirements of Article III. The Court has permitted individuals to assert claims on behalf of the government and others such as in the case of the appointment of special prosecutors, qui tam actions, next friend litigation, and shareholder-derivative suits. The prime purpose of justiciability is to ensure vigorous advocacy, and is meant to ensure that courts are responsible and constrained in their power. The most basic premise of the initiative process is that the right to make law rests in the people and flows to the government. The Court frustrates the choice of the people to govern themselves by nullifying a state supreme court decision holding that state law authorizes an enacted initiative's proponents to defend the law if the usual advocates decline to do so.

**Impact on Iowa Law.** The issue before the United States Supreme Court was whether the petitioners had standing under Article III of the United States Constitution to defend the constitutionality of Proposition 8. Even though the basis for the case was the initiative process, the decision is instructive to states without an initiative process in determining whether certain citizens may act as agents of the state to defend a law when public officials decline to do so. In this case, the Court required the petitioners to assert a particularized interest rather than a generalized interest and to be elected or appointed agents of the state who met the requirements of an agency relationship pursuant to the Restatement of Agency. Additionally, even though the California Supreme Court determined that the petitioners had standing to appeal, standing in federal court is a matter of federal law, and the United States Supreme Court had never upheld standing of a private party to defend the constitutionality of a state statute when state officials chose not and declined to do so.

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